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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-486

VIRGIN ISLANDS HOTEL ASSOCIATION (U.S.), INC., A CORPORATION,
Petitioner,

v.

VIRGIN ISLANDS WATER & POWER AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	2
STATUTE INVOLVED	2
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	
I. The United States Court of Appeals for the Third Circuit Correctly Found That the Principles of Administrative Law Established by This Court in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 93 S. Ct. 810 (1973), Justified the Nature and Conduct, by the Authority, of the Administrative Procedures Employed Herein	7
II. In Sustaining the Decision of the District Court of the Virgin Islands to Dissolve the Injunction Against Authority's Ratemaking Proceedings, the U.S. Court of Appeals for the Third Circuit Correctly Concluded that a Traditional Adversary Hearing, Including the Taking of Sworn Testimony, was Unnecessary Under the Standards of Due Process and Under the Procedural Requirements of 30 VIC, § 105(a)	12
III. On the Basis of The Full Record Before the United States Court of Appeals for the Third Circuit, it Cannot Be Concluded that the Petitioner was Prejudiced by the Administrative Procedures Employed By the Authority in the Proceedings Herein	20
IV. In Sustaining the District Court of the Virgin Islands, the United States Court of Appeals Correctly Ruled that the Authority Violated no Principle of Constitutional Law Applicable to Administrative Rate-Making Proceedings	24
CONCLUSION	27

Cases Page

FPC v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942) 14, 15, 24, 25, 26
Goldberg v. *Kelly*, 397 U.S. 254 (1970) 18, 19
Greene v. *McElroy*, 360 U.S. 474, 497 (1959) 19
Hannah v. *Larche*, 363 U.S. 420, 422 (1960) 12
I.C.C. v. *Louisville & Nashville Railroad*, 227 U.S. 88 (1913) 16, 17
Market St. Ry. Co. v. *Railroad Commission of California*, 324 U.S. 548 (1945) 17, 18
Morgan v. *United States*, 298 U.S. 468, 480-481 (1936) 12, 15, 16, 17
Morgan v. *United States*, 304 U.S. 1 (1938) 15, 16
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937) 16
Opp Cotton Mills v. *Administrator of Wage & Hour Division of the Department of Labor*, 312 U.S. 126 (1941) 13, 14
United States v. *Florida East Coast Railway Co.*, 93 S. Ct. 810 (1973) 2, 7, 8, 9, 10, 11, 12

Statutes

Administrative Procedure Act, 5 U.S.C.A., § 551 *et seq.* (1957) 8, 9
Fair Labor Standards Act, 29 U.S.C. § 201-209 13
Natural Gas Act, 15 U.S.C.A., § 717 *et seq.* 14
30 VIC, § 105(a) (1964) 2, 11, 12, 26
30 VIC, § 105(a)(12) (1964) 3, 4, 9, 12, 14, 23

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OPINIONS BELOW

The opinions, judgments and orders of the United States Court of Appeals for the Third Circuit and the District Court for the Virgin Islands to which the Petition is directed are accurately and adequately set forth in the Appendix filed by Petitioner.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Third Circuit correctly found that the principles of administrative law established by this Court in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 93 S. Ct. 810 (1973), justified the nature and conduct, by the Respondent, Virgin Islands Water & Power Authority (hereinafter Authority), of the administrative procedures employed herein?

2. Whether, in sustaining the decision of the District Court of the Virgin Islands to dissolve the injunction against Authority's ratemaking proceedings, the United States Court of Appeals for the Third Circuit correctly concluded that a traditional adversary hearing, including the taking of sworn testimony, was unnecessary under the standards of due process and to meet the procedural requirements of 30 VIC, § 105(a)?

3. Whether, on the basis of the full record before the United States Court of Appeals for the Third Circuit, it can be concluded that the Petitioner was prejudiced by the administrative procedures employed by the Authority in the proceedings herein?

4. Whether, in sustaining the District Court of the Virgin Islands, the United States Court of Appeals for the Third Circuit correctly ruled that the Authority violated no principle of constitutional law applicable to administrative ratemaking proceedings?

STATUTE INVOLVED

The Statute involved is the Virgin Islands Water and Power Authority Act, Title 30, Virgin Islands Code, § 101, *et seq.* (1964).

COUNTERSTATEMENT OF THE CASE

The Petitioner asserts (Petition, p. 10), that "[t]he questions involved are questions of law", and that ". . . [n]o facts are in dispute." While the Authority concurs that the matter comes before this Court on matters purely legal, rather than factual, the Authority takes firm exception to the distorted characterization of the relevant facts set forth in the Petition. Accordingly, the Authority sets forth the following counterstatement of the chronology of events which gave rise to these proceedings.

On November 10, 1971, the Authority issued a press release indicating its intention to raise electric rates for various power consumers in the Virgin Islands. Public hearings were held one week later and on December 3, 1971, the Authority implemented the upward adjustment of its electric rates.

The Petitioner, the Virgin Islands Hotel Association (U.S.), Inc. (hereinafter Petitioner), sought injunctive relief from the District Court of the Virgin Islands. The District Court granted the injunction upon concluding that the Authority had abused its powers as described in 30 VIC, § 105(a)(12), by effectuating rates without sufficient information in support thereof and by failing to hold adequate public hearings prior to implementing the rate change. On February 4, 1972, the District Court ordered the Authority to rescind the rate increases, to make an "appropriate" rate study, and to hold public hearings on the proposed increases. The injunction was stayed by the District Court for ten months to avoid possible financial disruption to the Authority.

On appeal by the Authority to the United States Court of Appeals for the Third Circuit, that court modified the judgment of the District Court and remanded the dispute, holding that 30 VIC, § 105(a)(12), contemplated

a "meaningful" public hearing where interested persons could present their views and evidence in support of their views, and that the essential requirements of such a hearing, (*e.g.*, adequate notice, public dissemination of the facts and figures relied upon by the Authority, and an opportunity for those attending the hearing to rebut those facts and figures), had not been provided by the Authority [465 F.2d 1272 (3 Cir. 1972)]. The Court of Appeals agreed that the Authority should be required to hold additional hearings after adequate notice to the public. At the same time, the Court of Appeals specifically found and concluded that 30 VIC, § 105(a)(12), did not require the Authority ". . . to make rate studies as such . . .", as contended by the Petitioner and required by District Court. The District Court's injunctive order was, therefore, modified to eliminate the requirement that the Authority conduct a rate study before adjusting its electric rates.

Although not required to do so under the guidelines set down by the Court of Appeals, the Authority commissioned two additional studies relating to the justification and necessity for a change in its electric rates and ordered the earlier study updated with current data. On July 5, 1972, the Authority issued public notice stating that new hearings would be held and that its updated report would be made available to the public for inspection. On August 12, 1972, the Authority announced that hearings would be held on September 11, 12 and 13. The first new rate study was made available to the public on August 8, 1972, the second on August 28, 1972.

The hearings were held on the announced dates. At each hearing, officials of the Authority commented on the proposed rate changes and representatives of the three engineering firms that prepared the studies of the necessity for a rate increase summarized and discussed their respective reports.

At each session of the hearings, the Authority provided an opportunity for all interested persons to submit written questions which would be answered by either an official of the Authority or a representative of one of the engineering firms employed by the Authority. Further, the Authority provided for the submission of written statements, questions and the presentation of oral statements. All questions submitted were answered and all statements submitted were accepted.

The Petitioner's secretary testified at the second hearing. Counsel for the Petitioner and an expert employed by the Petitioner attended the third hearing.

At that last session of the hearing, Counsel for Petitioner objected to the lack of "trial-type" procedures, but Counsel had no direct evidence to present nor written questions to submit. Instead, Petitioner's Counsel requested and was granted permission to give an oral "offer of proof" of the facts which Petitioner would have established if oral cross-examination had been allowed. Petitioner's Counsel then requested a two-month continuance of the hearing on the ground that such time was necessary for the Petitioner to prepare, and for the Petitioner's expert to examine "additional" and unspecified data allegedly relevant to the "reasonableness" of the proposed rate increase. Notwithstanding the passage of some three months since the initial decision of the Court of Appeals, Counsel admitted that the Petitioner's expert had not been contacted until six days before the last hearing.

Counsel's request for a continuance was denied. Following the hearing, and after consideration of information contained in the rate studies and Petitioner's oral "offer of proof" at the last session of the hearing, the Authority determined that the proposed rate increase was reasonable. The Authority thus adopted a resolution (See Appendix E), which incorporated its findings

and decision and implemented the upward adjustment in rates. The Authority then moved to vacate the injunction, which motion was granted by the District Court, based on both the facts presented at the hearings and the standards established by the Court of Appeals.

Appeal of that order was again taken by the Petitioner to the United States Circuit Court of Appeals for the Third Circuit. The Petitioner there alleged that it had been deprived of procedural due process in the Authority's hearings and that the Authority's decision was based on inadequate information. Finding that the Petitioner's allegations were unsupported, on April 12, 1973, the Court of Appeals affirmed the order of the District Court. On May 23, 1973, the Association's petition for rehearing was denied.

The foregoing chronology is amplified by the Petitioner through statements of conclusions and self-serving facts which are misleading and find no support in any of the decisions or the record below. For example, Petitioner states that:

> All of the [Authority's] reports fell far short of successfully justifying the projected electric revenue requirements in terms of reasonable electric operating costs (including financing costs) and the applicable debt service requirement; they failed to attempt to establish that the increased rate schedules were fair and devoid of undue discrimination. Petition at pp. 7-8.

However, quite to the contrary, the Court of Appeals specifically rejected this contention as follows:

> The Hotel Association contends that the Authority did not have adequate information on which to determine whether or not the rates were reasonable. The essence of this argument is that the Authority does not know how to allocate various expenses between water and power distribution and does not

know how much it costs it to supply power to the various types of power users. However, the three engineering studies introduced at the hearings seem to provide just this type of information. (Appendix G at p. 75a; 476 F.2d at 1269-70.)

The above conclusion, the Authority submits, is unassailable on the basis of the record before this Court. This is particularly apparent in light of the fact that, while it had every opportunity to do so, the Petitioner neglected to engage an expert in timely fashion in advance of the hearings or, in any manner, to demonstrate that the studies performed by and for the Authority were inadequate. Since there was nothing in the record to the contrary, the Authority, and subsequently the District Court and U. S. Court of Appeals for the Third Circuit, were compelled to the conclusion that the rate increase was necessary, justified and fully supported by the hearing record.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY FOUND THAT THE PRINCIPLES OF ADMINISTRATIVE LAW ESTABLISHED BY THIS COURT IN *UNITED STATES* v. *FLORIDA EAST COAST RAILWAY CO.*, U.S. , 93 S. CT. 810 (1973), JUSTIFIED THE NATURE AND CONDUCT, BY THE AUTHORITY, OF THE ADMINISTRATIVE PROCEDURES EMPLOYED HEREIN.

In sustaining the District Court of the Virgin Islands, the Court of Appeals, in both the majority and concurring opinions, relied upon the principles announced recently by this Court in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 93 S. Ct. 810 (1973).

Judge Adams, in the concurring opinion,[1] considered *Florida East Coast Railway* to be dispositive of the issues presented herein. The Authority respectfully submits that Judge Adam's analysis of the decision is correct and urges that this Court apply the principles enunciated in *Florida East Coast Railway* in denying the Petition for Certiorari.

As Judge Adams observed:

> The opinion in *United States* v. *Florida East Coast Railway Co.*, —— U.S. ——, 41 U.S.L.W. 4247 (U.S. Jan. 22, 1973) is the most recent pronouncement by the Supreme Court on the type of proceeding acceptable when an administrative agency promulgates a new rate schedule. The opinion makes clear that, at this time, there is no requirement of a traditional adversary hearing in a broad ratemaking context: such a deficiency is not violative of due process. Appendix G at page 77a; 476 F.2d at 1270.

To review, briefly, the salient features of *Florida East Coast Railway*, the railroad there challenged the establishment by the Interstate Commerce Commission of incentive per diem rates on freight cars. These rates were promulgated after a hearing which did not include several of the elements of an adversary proceeding. Upholding the implementation of the rates, this Court stated that the Commission's procedures satisfied the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and were not inconsistent with previous decisions of this Court interpreting the standards of due process in connection with specific administrative proceedings.

The majority opinion of the Court of Appeals below, while not placing the same emphasis upon the teachings

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[1] Appendix G at p. 76-78a; 476 F.2d at 1270.

of *Florida East Coast Railway* as did the concurring opinion, nevertheless recognized the relevance of that decision to the issues presented herein.

Initially, the majority recognized that, where, as here, ". . . decisions affecting large numbers of persons are likely to be more concerned with general policies than with specific facts and that permitting many persons to cross-examine each witness would make proceedings totally unmanageable . . ."[2], traditional adversary-type hearings are not required. This principle is applicable here since the "generalized" hearing requirements of 30 VIC, § 105(a)(12), are similar to the "generalized" hearing requirements at issue in *Florida East Coast Railway* under applicable provisions of the Administrative Procedure Act.[3]

Again, referencing *Florida East Coast Railway*, the majority noted that:

> ". . . a number of courts have held in cases which, like the one before us, . . . [which involve] complex and technical controversies, that written submissions, possibly supplemented by oral argument, suffice.[4]

The Authority, in the proceedings herein, provided for both written submissions and oral argument on matters which were both complex and technical in nature.

The Petitioner herein attempts to avoid the clear import of *Florida East Coast Railway, supra*, by contending, *inter alia*, that the proceedings herein were "particularized", as opposed to "generalized" in an obvious effort to invoke more formalized procedural requirements

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[2] Appendix G at p. 72a; 476 F.2d at 1268. Citing *Florida East Coast Railway, supra.*

[3] 5 U.S.C.A., § 551 *et seq.* (1957).

[4] Appendix G at p. 73a; 476 F.2d at 1268.

such as those which would be applicable to "particularized" proceedings under the Administrative Procedure Act.[5] Since the Administrative Procedure Act is not applicable here,[6] the Petitioner attempts to wring from prior decisions of this Court a thread of a due process argument and to impose upon the Authority the more stringent hearing requirements applicable to administrative agencies in "particularized" proceedings under the Administrative Procedure Act.[7]

On this basis, the Petitioner contends that the Court below "misconstrued" and "misapplied" *Florida East Coast Railway Company, supra*, in concluding that the proceedings at issue herein were "generalized" rather than "particularized".

The Petitioner further contends that this "misapplication" constitutes reversible error for the curious reason that ". . . the proceeding affects the Authority alone, not a multiplicity of persons subject to regulation". (Petition at p. 11).

The argument is a "red herring" which only serves to demonstrate Petitioner's lack of understanding of the decision of the Court of Appeals. The Court of Appeals, refusing to be drawn into making this distinction, commented that:

> . . . [i]nstead, we rely on the failure of the Hotel Association to have demonstrated the inadequacy of written questions, which were permitted." (Appendix G at p. 74a; 476 F.2d 1269.)

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[5] See Petition at p. 11.

[6] Note: The Court below looked to cases arising under the Administrative Procedure Act for guidance but specifically, and quite correctly, concluded that these proceedings are not subject to that Act. See Appendix G at p. 72a; 476 F.2d at 1268.

[7] See discussion of relevant decisions pertaining to standards of due process in Argument II, p. 12, *infra*.

But even assuming, *arguendo*, that the point is relevant, the Authority submits that the result would be the same. For, whether a proceeding is "particularized" or "generalized" depends upon whether ". . . the proposed agency action affects a small or a large number of persons." (Appendix G at p. 72a; 476 at p. 1268). In raising this point, Petitioner seems to assume that the agency action affects only the Authority. This assumption is absurd since the proceedings affected virtually *every* power consumer in the Virgin Islands, including the Petitioner.

Under these circumstances, the proceedings were obviously "generalized" and, under the teachings of *Florida East Coast Railway, supra*, an "evidentiary" or "trial type" hearing would not have been required even under the more specific procedural standards of the Administrative Procedure Act.

In examining the language of the controlling legislation, 30 VIC, § 105(a), the Court of Appeals found a lack of specificity or detail as to the manner in which hearings are to be conducted by the Authority, and simply concluded that such lack of specificity gave the Authority "greater leeway" in conducting proceedings under 30 VIC, § 105(a). In essence then, the Court of Appeals reasoned that, since the governing statute is silent as to the type of hearing required, the only function of the reviewing Court is to determine whether a hearing held thereunder was "meaningful" within the guidelines established by this Court.

The Court of Appeals did conclude that the Authority's hearings were "meaningful" and were consistent with the requirements of due process. Under these circumstances, the decision of the Court of Appeals below is clearly consistent with the decision of this Court in *Florida East Coast Railway* and should be upheld.

II.

IN SUSTAINING THE DECISION OF THE DISTRICT COURT OF THE VIRGIN ISLANDS TO DISSOLVE THE INJUNCTION AGAINST AUTHORITY'S RATEMAKING PROCEEDINGS, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT A TRADITIONAL ADVERSARY HEARING, INCLUDING THE TAKING OF SWORN TESTIMONY, WAS UNNECESSARY UNDER THE STANDARDS OF DUE PROCESS AND UNDER THE PROCEDURAL REQUIREMENTS OF 30 VIC, § 105(a).

Assuming, *arguendo*, that *Florida East Coast Railway Co., supra*, is not dispositive of the issues presented herein, the hearings and procedures employed by the Authority in the ratemaking process nevertheless meet the requirements of procedural due process as defined in earlier decisions of this Court. Since the provisions of 30 VIC, § 105(a)(12) are silent on the precise nature of procedures and proceedings to be conducted by the Authority and, since the Court below found that the hearings and proceedings challenged by the Petitioner herein complied with the broad guidelines of the applicable statute, the decision below must be affirmed regardless of the applicability *vel non* of the principles established in *Florida East Coast Railway Co., supra.*

Procedural due process in ratemaking hearings is not subject to a single definition and is clearly not synonymous with "trial-type" hearings.[8] The requirements of procedural due process vary with the nature of each hearing and the circumstances that surround it.[9]

Despite these well-established principles, the Petitioner asserts that the Court below rendered:

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[8] See *Morgan* v. *United States*, 298 U.S. 468, 480-481 (1936).

[9] *Hannah* v. *Larche*, 363 U.S. 420, 422 (1960).

> ". . . a shocking decision which jettisons 100 years of case law assuring constitutional procedural safeguards in traditional utility ratemaking proceedings." (Petition at p. 3).

However, an examination of the decisions cited by the Petitioner in support of this sweeping conclusion shows, quite to the contrary, that the decision below is a sound application of principles of administrative and constitutional law developed carefully by this Court in a never ending balancing of the needs of governmental institutions and the rights of those whose lives are affected by governmental decisionmaking.

Opp Cotton Mills v. *Administrator of Wage & Hour Division of the Department of Labor*, 312 U.S. 126 (1941), does not support the Petitioner's proposition that:

> . . . Where administrative actions involve resolution of factual issues concerning particular parties, the established principle, grounded in due process, requires a trial-type hearing.[10]

Opp Cotton dealt with the Fair Labor Standards Act, 29 U.S.C., §§ 201-209, which required industry committees to recommend to the Administrator, minimum wages for an industry after investigating the conditions of the industry, hearing witnesses, and receiving evidence. On the pages cited by the Petitioner,[11] the Court stated that the Committee was not required by the statute to conduct quasi-judicial hearings in reaching decisions. Since the Committee, in *Opp Cotton*, was concerned with factual issues concerning particular parties, the case actually refutes the proposition for whcih it was cited by Petitioner. In *Opp Cotton*, this Court upheld the judgment of the lower court which had sustained the Board Order

[10] Petition at p. 15.

[11] 312 U.S. at 152-153.

on the ground that the Order was supported by substantial evidence.[12] The same reasoning was employed by the Court below in the present case. Thus, no conflict between these decisions exist.

Proceeding on the erroneous assumption that the "principle" of *Opp Cotton* requires a trial-type hearing in all administrative decisionmaking proceedings, the Petitioner then compounds its misunderstanding of *Opp Cotton* by the assertion that, under *F.P.C.* v. *Natural Gas Pipeline Company*, 315 U.S. 575 (1942), this "principle" is also applicable in ratemaking proceedings. However, the *Natural Gas Pipeline Company* case, and particularly the portions thereof cited and relied upon by Petitioner, supports no such proposition.

Natural Gas Pipeline arose under the specific requirements of the Natural Gas Act,[13] which are far more specific as to the hearing procedures which must precede any final order of the Federal Power Commission than those applicable to the Authority under 30 VIC, § 105(a)(12). There, the Court, after observing that the Commission had complied with the procedural requirements of the Act, concluded that:

> . . . The companies cannot complain that they were denied a full hearing because they had not been able to examine on redirect their own witnesses who had not been cross-examined, or because they had no opportunity to cross-examine or rebut witnesses who were not offered by the Commission. (315 U.S. at 584).

Thus, if the *Natural Gas Pipeline* case is relevant at all, it supports the Authority rather than the Petitioner. The Authority followed the broad procedural guidelines established in the statute and delineated by the Court of Ap-

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[12] 312 U.S. at 156.

[13] 15 U.S.C.A., §§ 717 *et seq.*

peals. The Petitioner made no attempt, within the applicable procedures, to challenge the evidence before the Authority or to offer witnesses or evidence in rebuttal. As this Court, in *Natural Gas Pipeline*, observed:

> The right to a full hearing before any tribunal does not include the right to challenge or rely on evidence not offered or considered. [Citations omitted]. (315 U.S. at 584).

Petitioners here urge this Court to take cognizance of evidence not offered or considered except in the form of unsupported conclusions tendered orally by Petitioner's counsel in Petitioner's "offer of proof".

Nor does the decision below conflict with the decision of this Court in *Morgan* v. *United States*, 304 U.S. 1 (1938). The administrative procedure employed in *Morgan* was held to be defective primarily because no notice of the order in question was provided. The Court, in *Morgan*, observed that interested and affected parties were entitled to ". . . a reasonable opportunity to know the claims of the opposing party and to meet them." [14]

The proceedings here under review contain no such procedural defect as was found to be fatal in *Morgan*, since adequate notice was provided. In point of fact, the Petitioner has not seriously contended that the notice issued by the Authority was inadequate or deficient. Petitioner was apparently unable to participate in the hearings as fully as it might have only because it chose to ignore the notice and failed to engage expert assistance until almost the eve of the hearings.

The earlier case entitled, *Morgan* v. *United States*, 298 U.S. 468 (1936), also relied upon by the Petitioner, is compatible with the present case for the same reason. In describing the meaning of a "full hearing" the Court there observed that:

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[14] 304 U.S. at 19.

> There must be evidence adequate to support the pertinent and necessary findings of fact . . . The 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that no hearing has been given . . . Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense.[15]

The decision of the Court below meets the *Morgan* test since the central focus of the Court was on how "meaningful" the hearings were, not on the "technical" aspects thereof.

I.C.C. v. *Louisville & Nashville Railroad*, 227 U.S. 88 (1913), similarly offers no support for Petitioner's position. There, the government contended that the order in question need not be supported by substantial evidence.[16] This Court rejected this contention, but, upon examining the full record, found that the order was in fact supported by substantial evidence.[17] The Authority's decision here under review has met the same "substantial evidence" test according to the specific findings of the District Court and Court of Appeals below. Thus, the decision below is entirely consistent with the holding of this Court in *I.C.C.* v. *Louisville*.

Petitioner also relies upon *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937), another case dealing with the alleged impropriety of administrative orders based upon inadequate evidence.[18] The procedural "safeguard" alluded to in *Ohio Bell* is not that of a "trial-type" or "evidentiary" hearing, but

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[15] 298 U.S. at 480-481.

[16] See 227 U.S. at 91.

[17] See 227 U.S. at 100.

[18] See 301 U.S. at 303.

that of ". . . a fair and open hearing." [19] In any event, the hearings in question must be considered "fair" and "open" since the Court below specifically found them to be "meaningful" within the meaning of 30 VIC, § 105 (a) (12).

After incorrectly concluding that all administrative proceedings of the type conducted here require trial-type hearings, the Petitioner compounds its error by concluding that all trial-type hearings require cross-examination.[20] To support this conclusion, the Petitioner relies upon *Market St. Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548 (1945), which teaches that:

> Due process, of course requires that Commissions proceed on matters in evidence and that parties have opportunity to subject evidence to the test of cross-examination and rebuttal.[21]

While the quotation from *Market Street* would appear to provide support for Petitioner's assertion that due process in administrative hearings requires full cross-examination, the quotation is taken wholly out of context. In *Market Street*, some of the information relied upon by the Railroad Commission in rendering its decision was not in the hearing record and was available only after the hearing in question was completed. The Court noted, however, that the appellant did not contend the information was erroneous or that it could be disproved. The Court then observed that "[I]t does not appear that appellant was in any way prejudiced . . ." by the Commission's reliance on such information.[22]

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[19] Citing *Morgan* v. *United States*, 298 U.S. 469 (1936), and *I.C.C.* v. *Louisville*, *supra*.

[20] See Petition at p. 17.

[21] 324 U.S. at 562.

[22] 324 U.S. at 562.

At this point, the Court made the statement, herein relied upon by Petitioner, to the effect that due process requires cross-examination and rebuttal. But following this statement, the Court observed that:

> ". . . due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties. The process of keeping informed as to regulated utilities is a continuous matter with Commissions. We are unwilling to say that such an incidental reference as we have here to a party's own reports, although not formally marked in evidence in the proceeding, in the absence of any showing of error or prejudice constitutes a want of due process." [23]

At best, the Petitioner has relied upon *obiter dicta* from a case which is clearly compatible with the decision of the Court of Appeals below. *Market Street* underscores the essence of the decision below, *i.e.*, that the requirements of due process in administrative proceedings are flexible, that they pertain to substance rather than form, and that a lack of due process cannot be established without a showing of prejudice.

Goldberg v. *Kelly*, 397 U.S. 254 (1970), another case relied upon by the Petitioner to equate cross-examination with procedural due process, is more notable for its language than for its meaning. The unusual facts of *Goldberg* v. *Kelly*, involving a welfare recipient who was without counsel and unable to write effectively, clearly led the Court to conclude that oral cross-examination was essential to assure due process on the peculiar facts of that case. The Court relied strongly on these particular circumstances, and upon the fact that "credibility and veracity are at issue, as they must be in many ter-

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[23] 324 U.S. at 562.

mination proceedings : . ." [24] The Court also pointed out that ". . . the evidence consists of testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers . . ." [25]

The situation in the present case is clearly distinguishable. The information before the Authority was of a highly technical nature and it is doubtful that oral cross-examination of the experts who prepared it would have been any more helpful or served the public interest more than the procedure established and followed by the Authority. The evidence relied upon by the Authority was not the product of the memory of witnesses which might be faulty and neither the credibility nor the veracity of the Authority's experts was challenged by the Petitioner.

While the Court below was "reluctant to hold that cross-examination is never needed" in proceedings conducted by the Authority,[26] the Court nevertheless pointed out that since ". . . the persons who testified did so in their professional capacities, it does not seem particularly significant that they were not under oath".[27] Under these circumstances, the Authority submits that *Goldberg* has little relevance to the present cause.

Thus, the cases relied upon by the Petitioner, far from demonstrating the need for trial-type hearings and oral cross-examination in administrative utility ratemaking proceedings, actually support the decision of the Court below and sanction the conduct of these proceedings by the Authority.

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[24] 397 U.S. at 269.

[25] 397 U.S. at 270, citing *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959).

[26] Appendix G at page 74a, fn. 11; 476 F.2d at 1269, fn. 11.

[27] Appendix G at page 71a, fn. 9; 476 F.2d at page 1268; fn. 9.

III.

ON THE BASIS OF THE FULL RECORD BEFORE THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, IT CANNOT BE CONCLUDED THAT THE PETITIONER WAS PREJUDICED BY THE ADMINISTRATIVE PROCEDURES EMPLOYED BY THE AUTHORITY IN THE PROCEEDINGS HEREIN.

The Authority respectfully submits that the Petition for Certiorari herein should be dismissed on the basis of the principles set forth and analyzed in the foregoing Arguments I and II and submits that it is wholly unnecessary, on the basis of the record and decision below, for this Court to examine and pass upon each of the many contrived assertions that the Petitioner suffered prejudice by the administrative procedures employed by the Authority in the proceedings herein. These many spurious complaints were considered and rejected, *seriatum*, by the Court below for good and sufficient reasons.

In the proceedings below, the Petitioner argued that the Authority's hearings were flawed by insufficient notice and inadequate dissemination of the information upon which the Authority relied. The Court below correctly treated this argument for what it is, *i.e.*, an attempt by the Petitioner to extricate itself from a situation brought on by its own inaction and lack of diligence. As the Court of Appeals observed:

> The Hotel Association now complains that notice of about one month was too short. What the Hotel Association in effect asks us to ignore is the district court's injunction which had been stayed for only ten months. As of June 28, when this court handed down its affirmance of that injunction, it was clear to all concerned that the Authority would have to hold new hearings. Moreover, the July 5th press release was sufficient to warn the Hotel Association

> of the need to retain its expert. *Thus, the Hotel Association has only itself to blame for waiting before seeking an expert qualified to present its case.* (Appendix E, p. 71a; 476 F.2d at 1267.) (Emphasis supplied.)

Similarly, the Petitioner contends that it was prejudiced by the Authority's refusal to interrupt the hearings for a two-month period to permit Petitioner to prepare. This assertion, when considered in the light of the facts, is frivolous. The request for a continuance was made at the last session of the hearings, with no prior notice to the Authority and without even a modicum of a showing that good cause existed for the delay. The Petitioner's request was made at the "eleventh hour" despite the fact that the Petitioner had been on notice for some three months and could at least have made the request at the first session of the hearings. Moreover, in making its tardy request, the Petitioner was fully aware of the potential damage which further delay would visit upon the financial health of the Authority.[28]

The remaining procedural objections which the Petitioner here asserts were presented in precisely the same form before the Court of Appeals below. The conclusions reached by the Court below in disposing of those assertions are unassailable in light of the record considered and the Petitioner sets forth no new reasons for this Court to find otherwise.

The Petitioner's other complaints with the decision below may be treated briefly, *seriatum*, as follows:

1) Petitioner objects to the fact that officials of the Authority presided over the hearings. The Court below considered this objection and reasoned that:

> . . . because the Board of the Authority had the responsibility [by statute] for the final decision on the

[28] See, *e.g.*, Appendix G, p. 71a, fn. 8; 476 F.2d 1267, fn. 8.

rate increases, it is not at all evident how having a trial examiner take testimony would have altered that decision in any way. (Appendix G at page 75a; 476 F.2d at 1269).[29]

2) The Petitioner challenges the Authority's decision on the ground that the Authority considered factual material outside of the hearing record. The challenge is based upon the language of the Authority's resolution[30] setting forth its findings and decision. However, as the Court below observed:

> ". . . [t]he Hotel Association's interpretation of this language is contrary to its obvious meaning."[31]

Moreover, the Petitioner has submitted no evidence which would lead to any different conclusion.

3) The Petitioner asserts that it suffered prejudice by the Authority's setting rates in other than a "trial-type" proceeding. In responding to this assertion, the Court below properly recognized that the issue presented was not whether the governing statute required "trial-type" hearings in each case, or in any case, but rather, whether such hearings were required in *this* case. Here, too, the particular circumstances and nature of the hearing were controlling. The Court below noted that the matters raised in the Petitioner's "offer of proof" could as easily and effectively have been formulated into written questions as into oral cross-examination.[32] Thus, since the Petitioner was not prejudiced by the

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[29] Judge Adams, in a concurring opinion, noted his preference for "an impartial presiding officer", but, in the context of the present case, nevertheless concluded that the absence of such an officer did not render the proceedings defective. (Appendix G at p. 78a, fn. 3; 476 F.2d at 1271, fn. 3).

[30] The Authority's resolution is reproduced as Appendix E filed by the Petitioner.

[31] Appendix G at p. 75a; 476 F.2d at p. 1269.

[32] Appendix G, at p. 74a; 476 F.2d at p. 1269.

limitations of the hearings, the Court below correctly concluded that the hearings afforded procedural due process.

4) The Petitioner also contends that the Authority's decision was unreasonable and thus violative of 30 VIC, § 105(a)(12) because it was based upon inadequate information. In this regard, Petitioner claims that the decision below allows the Authority to employ ". . . *any* future cost increase as justification for increasing its electric rates . . . regardless of whether the increased rates are 'reasonable'." [Emphasis in original].[33] The Court of Appeals evaluated this contention and resolved it by examining the engineering reports provided to the public and relied upon by the Authority in determining the need for a rate increase. As observed by the Court of Appeals, the reports in question contain precisely the type of information specified and requested by the Petitioner, and:

> The Hotel Association has clearly failed to demonstrate the type of statutory violation subject to review by this Court. (Appendix G at 75a; 476 F.2d at 1269-70).

Thus, an examination of each objection raised by Petitioner discloses no basis for concluding that the hearings or the information developed therein were inadequate. Since the hearings in question comported with the requirements of due process and since the Authority's resolution implementing an upward adjustment in its electric rates is supported by substantial evidence, no useful purpose would be served by further review by this Court.

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[33] Petition, pp. 20-21.

IV.

IN SUSTAINING THE DISTRICT COURT OF THE VIRGIN ISLANDS, THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY RULED THAT THE AUTHORITY VIOLATED NO PRINCIPLE OF CONSTITUTIONAL LAW APPLICABLE TO ADMINISTRATIVE RATEMAKING PROCEEDINGS.

The Petitioner, in another attempt to invoke the protection of the Fifth and Fourteenth Amendments of the Constitution in its attack on the Authority's ratemaking proceedings, asserts that the resulting rates will constitute "unconstitutional takings of property." [34] In support of this contention, the Petitioner makes no attempt to establish that the Authority's proposed rates would be confiscatory. Rather, the Petitioner cites and relies upon *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942), and asserts that the latter case establishes ". . . a general principle of constitutional law . . ." which must be followed in all such ratemaking proceedings. In this regard, Petitioner characterizes the requirements of *Natural Gas Pipeline Co., supra*, as follows:

> . . . a determination of reasonable rates *must involve* two basic steps: (1) the adjustment of the general revenue level to cover reasonable operating costs, including financing costs, and the debt service requirement of bond convenants (in the case of publicly-owned utilities); and (2) the adjustment of rate schedules conforming to that level so as to eliminate undue discrimination and unfairness from their details.[35] [Emphasis added].

Petitioner paraphrases, rather than quotes *Natural Gas Pipeline Co., supra*, and, in so doing, misleads the

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[34] Petition at p. 19.

[35] Petition at p. 19.

reader. For this Court did not say that ratemaking proceedings "must" involve the two steps alluded to by the Petitioner but, rather, that such proceedings "often involve" such steps.

In characterizing the second step involved, the Petitioner takes more license than advocacy permits in failing to point out that this Court actually sanctioned the ". . . adjustment of the general revenue level to the demands of a fair return." [36]

When read in proper context, the two steps described by this Court for the adjustment of the general revenue level by utilities is no more and no less than the steps followed by the Authority in these proceedings.

If reference to the proper language from *Natural Gas Pipeline Co.* is not sufficient to dispel the notion that the Authority violated a "general principle of constitutional law", the following language of this Court in *Natural Gas Pipeline Co.* should be conclusive:

> The Constitution does not bind ratemaking bodies to the service of any single formula or combination of formulas.
>
> * * * *
>
> Once a fair hearing has been given proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.[37]

The Court below not only found that the hearings below were "meaningful" and not violative of the standards of due process, but that the formula employed by the Authority in reaching the decision to increase its

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[36] 315 U.S. at 584.

[37] 315 U.S. at 586.

electric rates was both "fair" and supported by substantial evidence.[38]

As to the belated contention now advanced by Petitioner that the rate level adopted by the Authority amounts to an unconstitutional taking, the Court below noted that:

> Finally, we note that the Hotel Association did not attempt to establish in the Authority's September 1972 hearings or in the subsequent district court proceeding, and does not now urge, that the increase in electric rates is confiscatory. At the district court proceeding held on December 21, 1971, where the Hotel Association challenged the first set of hearings held by the Authority, there was uncontradicted testimony by various witnesses that the electric power bills of Virgin Islands hotels accounted for between four and eight percent of all operating costs (including debt service). With the proposed increase in mind, the district court at that time computed that the rate increases would increase overall operating costs by about two percent an amount which it concluded was not going to put the hotels out of business.[39]

Having wholly failed in its attempt to establish that the Authority's proposed electric rates are "confiscatory" and otherwise in violation of any relevant constitutional or other principles establishes by this Court, or of the provisions of 30 V.I.C., § 105(a), the "constitutional" error alleged and asserted by Petitioner under *Natural Gas Pipeline Co.* and the Fifth and Fourteenth Amendments to the Constitution must be rejected.

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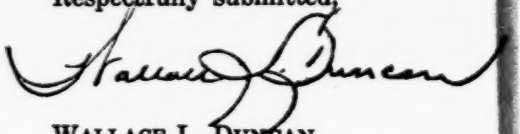
[38] Appendix G at p. 75a; 476 F.2d at 1269.

[39] Appendix G at pp. 75-76a; 476 F.2d at 1270.

CONCLUSION

For each of the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Wallace L. Duncan, hereby certify that on October 12, 1973, the Brief for Respondent In Opposition in the above-captioned proceeding was served upon counsel for the Appellant Virgin Islands Hotel Association, (U.S.) Inc. by mailing multiple copies thereof, postage prepaid, to Isherwood & Colianni, Vincent A. Colianni, Esquire, and Evelyn N. Cooper, 40 King Street, Christiansted, St. Croix, U.S. Virgin Islands 00620.

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October 12, 1973